



Billing Code: 8025-01

SMALL BUSINESS ADMINISTRATION

13 CFR Part 127

Women-Owned Small Business Federal Contract Program

RIN: 3245-AG72

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to amend its regulations to implement section 825 of the National Defense Authorization Act for Fiscal Year 2015 (2015 NDAA). Section 825 of the 2015 NDAA included language granting contracting officers the authority to award sole source contracts to Women-Owned Small Businesses (WOSBs) and Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs). Section 825 of the 2015 NDAA also changed the deadline for SBA to conduct a study to determine the industries in which WOSBs are underrepresented to January 2, 2016. As a result, SBA is proposing to amend its definitions of underrepresentation and substantial underrepresentation.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN: 3245-AG72, or by docket number SBA-2015-0004, by any of the following methods: (1) Federal Rulemaking Portal: <http://www.regulations.gov> and follow the instructions for submitting comments; or (2) Mail/Hand Delivery/Courier: Brenda Fernandez, U.S. Small

Business Administration, Office of Policy, Planning & Liaison, 409 Third Street, SW, 8th Floor, Washington, DC 20416. SBA will not accept comments to this proposed rule submitted by email. SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please submit the information to Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street, SW, 8th Floor, Washington, DC 20416, or send an email to brenda.fernandez@sba.gov.

Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning & Liaison, 409 Third Street, SW, 8th Floor, Washington, DC 20416; (202)-205-7337; brenda.fernandez@sba.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Women-Owned Small Business (WOSB) Program, set forth in section 8(m) of the Small Business Act, 15 U.S.C. 637(m), authorizes Federal contracting officers to restrict competition to eligible Women-Owned Small Businesses (WOSBs) or Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) for Federal contracts in certain industries. Section 8(m) of the Small Business Act (Act) sets forth certain criteria for the WOSB Program, including the eligibility and contract requirements for the program. Congress recently amended the WOSB Program with section 825 of the National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-

291, 128 Stat. 3292 (December 19 2014) (2015 NDAA), which included language granting contracting officers the authority to award sole source awards to WOSBs and EDWOSBs and shortening the time period for SBA to conduct a required study to determine the industries in which WOSBs are underrepresented.

II. Section-by-Section Analysis

A. Sole Source Authority

In order to implement these statutory changes, SBA is proposing to amend 13 CFR part 127. Specifically, this proposed rule amends § 127.101, concerning the type of contracting assistance available under part 127, to include the new sole source authority. This proposed rule also amends the definitions of the terms “EDWOSB requirement” and “WOSB requirement” in § 127.102 to include sole source contracts. The proposed rule also amends § 127.500, which concerns the industries in which a contracting officer is authorized to restrict competition under the WOSB program, to address the new sole source authority.

SBA proposes to amend § 127.503 by adding two new paragraphs to incorporate the statutory language of section 825 of the 2015 NDAA granting authority for sole source contracts to EDWOSBs and WOSBs. Under this statutory authority, if a contracting officer conducts market research in an industry where a WOSB or EDWOSB set-aside is authorized, and the contracting officer cannot identify two or more WOSBs or EDWOSBs that can perform at a fair and reasonable price, but identifies one WOSB or EDWOSB that can perform at a fair and reasonable price, the contracting officer can award the contract on a sole source basis, if the value of the contract, including options, does not exceed \$6.5 million for manufacturing contracts and \$4 million for all other contracts.

The proposed rule also amends § 127.507, concerning contracting opportunities at or below the simplified acquisition threshold, to address sole source awards under the WOSB Program. Finally, the proposed rule amends the protest regulations in § 127.600 to include procedures for protests involving sole source contracts. The protest procedures for sole source contracts to WOSBs and EDWOSBs would be the same as those procedures for sole source contracts involving service-disabled veteran owned small business concerns (SDVO SBC) (§ 125.24(a)) and HUBZone small business concerns (§ 126.800(a)).

B. Time Period for Study

In order to comply with the revised timeline for SBA to conduct a required study to determine the industries in which WOSBs are underrepresented, SBA is proposing to revise the definitions of “underrepresentation” and “substantial underrepresentation” in § 127.102. Section 825 established a new timeline for SBA to conduct a study to determine the industries in which WOSBs are underrepresented. The original deadline for this study was established by section 1697(b) of the National Defense Authorization Act of 2013, Pub. L. 112-239, January 2, 2013, 126 Stat. 2091 (2013 NDAA), which required SBA to conduct a study of the industries in which WOSBs are underrepresented within five years of the date of enactment of the 2013 NDAA (and every 5 years thereafter). Section 825 of the 2015 NDAA amended section 1697(b) of the 2013 NDAA and changed the deadline to within 3 years of the date of enactment of the 2013 NDAA, which means the study must be conducted by January 2, 2016.

In order to meet this deadline, the proposed rule amends the definitions of the terms “substantial underrepresentation” and “underrepresentation” in § 127.102. This change would allow SBA to conduct a study within the time constraint imposed by

Congress by providing SBA with the flexibility necessary to conduct the most reliable and relevant study of WOSB participation in Federal contracting. In addition, the new definitions of these terms would align more closely than the current definitions with the statutory intent of the 2013 NDAA and the 2015 NDAA.

C. Other

SBA recognizes that Section 825 also created a requirement that a firm be certified as a WOSB or EDWOSB by a Federal Agency, a State government, SBA, or a national certifying entity approved by SBA. This statutory requirement appears to apply to both sole source and set asides under the WOSB Program, and may require substantial resources. Establishing a certification requirement and process will require a more prolonged rulemaking before SBA can establish such a program. In our view, there is no evidence that Congress intended to halt the existing WOSB Program until such time as SBA establishes the infrastructure and issues regulations implementing the statutory certification requirement. Instead, we maintain that the new WOSB sole source authority can and should be implemented as quickly as possible, using existing program rules and procedures, while SBA proceeds with implementing the certification requirement through a separate rulemaking.

III. Compliance with Executive Orders 12866, 12988, 13132, 13563, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612) Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule does not constitute a significant regulatory action under Executive Order 12866. This is not a major rule under the Congressional Review Act (CRA), 5 U.S.C. 800.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that the proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore SBA has determined that this proposed rule has no federalism implications warranting the preparation of a federalism assessment.

Executive Order 13563

A description of the need for this regulatory action, the benefits and costs associated with this action, and any alternatives are included in the Initial Regulatory Flexibility Analysis.

In drafting this proposed rule, SBA considered input submitted by three coalitions of women's groups representing women-owned small businesses who support this rule and encourage its quick implementation.

Paperwork Reduction Act, 44 U.S.C., Ch. 35

For the purpose of the Paperwork Reduction Act, 44 U.S.C., Chapter 35, SBA has determined that this proposed rule does not impose additional reporting or recordkeeping requirements.

Regulatory Flexibility Act, 5 U.S.C., 601-612

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. In accordance with this requirement, SBA has prepared an Initial Regulatory Flexibility Analysis addressing the impact of this rule.

Initial Regulatory Flexibility Analysis

1. What are the need for and objective of this proposed rule?

This proposed rule is necessary to implement Section 825 of the National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, December 19, 2014, 128 Stat. 3292 (2015 NDAA). Section 825 of the 2015 NDAA included language granting contracting officers the authority to award sole source contracts to Women-Owned Small Businesses (WOSBs) and Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs). The purpose of this rule is to establish the procedures whereby Federal agencies may award sole source contracts to WOSBs and EDWOSBs and to provide a mechanism to protest such awards. The rule provides an additional tool for Federal agencies to ensure that WOSBs have an equal opportunity to participate in Federal contracting and ensures consistency among SBA's socio-economic small business contracting programs. The objectives of this proposed rule are to put the WOSB Program on a level playing field with other SBA government contracting programs with sole source authority, and to provide an additional, needed tool for agencies to meet the statutorily mandated 5% prime contracting goal for WOSBs.

Section 825 of the 2015 NDAA also revised the timeline for SBA to conduct a study to determine the industries in which WOSBs are underrepresented. This proposed

rule is necessary to allow SBA to conduct the most reliable and relevant study of WOSB participation in Federal contracting and comply with the new statutorily mandated timeline.

2. What is the legal basis for this proposed rule?

The legal basis for this proposed rule is section 825 of the National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, December 19, 2014, 128 Stat. 3292, which amended Section 8(m) of the Small Business Act, 15 U.S.C. 637(m).

3. What is SBA's description and estimate of the number of small entities to which the rule will apply?

The RFA directs agencies to provide a description, and where feasible, an estimate of the number of small business concerns that may be affected by the rule. This proposed rule establishes a new procurement mechanism to benefit WOSBs. Therefore, WOSBs and EDWOSBs available to compete for Federal contracts under the WOSB Program are the specific group of small business concerns most directly affected by this rule.

SBA searched the Dynamic Small Business Supplemental Search (DSBS) and determined that there were approximately 34,000 firms listed as either WOSBs or EDWOSBs under the WOSB Program. In addition, according to the fiscal year 2013 small business goaling report, there were a little over 250,000 actions concerning women-owned small businesses and the total dollar value of those actions was approximately \$15 billion. An analysis of the Federal Procurement Data System from April 1, 2011 (the implementation date of the WOSB Program) through January 1, 2013, revealed that there were approximately 26,712 women-owned small business concerns, including 131

EDWOSBs and 388 WOSBs eligible under the WOSB Program, that received obligated funds from Federal contract awards, task or delivery orders, and modifications to existing contracts.

Therefore, this rule could affect a smaller number of EDWOSBs and WOSBs than those eligible under the WOSB Program. We note that the sole source authority can only be used where a contracting officer conducts market research in an industry where a WOSB or EDWOSB set-aside is authorized, and the contracting officer cannot identify two or more WOSBs or EDWOSBs that can perform at a fair and reasonable price, but identifies one WOSB or EDWOSB that can perform. In addition, the sole source authority for WOSBs and EDWOSBs is limited to contracts valued at \$6.5 million or less for manufacturing contracts and \$4 million or less for all other contracts.

Nonetheless, we believe that this rule may have a significant positive economic impact on EDWOSB concerns competing for Federal contracting opportunities in industries determined by SBA to be underrepresented by WOSB concerns and likewise may positively affect WOSB concerns eligible under the WOSB Program competing in industries determined by SBA to be substantially underrepresented by WOSB concerns, since the sole source authority will still provide greater access to Federal contracting opportunities.

4. What are the projected reporting, recordkeeping, Paperwork Reduction Act, and other compliance requirements?

SBA has determined that this rule does not impose additional reporting or recordkeeping requirements.

5. What relevant federal rules may duplicate, overlap, or conflict with this rule?

SBA has not identified any relevant Federal rules currently in effect that duplicates this rule. The sole source mechanism of the WOSB program will be an addition to the procurement mechanisms available under the existing small business contracting programs that agencies currently administer, such as the HUBZone Program, the Service-Disabled Veteran-Owned (SDVO) Small Business Program, and the 8(a) Business Development Program. The sole source mechanism for WOSBs and EDWOSBs is only authorized where a contracting officer conducts market research in an industry where a WOSB or EDWOSB set aside is authorized, and the contracting officer cannot identify two or more WOSBs or EDWOSBs that can perform at a fair and reasonable price, but identifies one WOSB or EDWOSB that can perform (and so long as the value of the contract, including options, does not exceed \$6.5 million for manufacturing contracts and \$4 million for all other contracts). Therefore, the addition of the sole source mechanism for WOSBs and EDWOSBs should complement rather than conflict with the goals of existing small business procurement programs.

SBA believes that the Federal Acquisition Regulations (FAR) will need to be amended to include this authority so that there is no conflict between the SBA's rules and the FAR.

6. What significant alternatives did SBA consider that accomplish the stated objectives and minimize and significant economic impact on small entities?

The RFA requires agencies to identify alternatives to the rule in an effort to minimize any significant economic impact of the rule on small entities. The statutory authority for the sole source awards sets forth specific criteria, including dollar value

thresholds for the awards. Therefore, the proposed regulations must implement the statutory provisions, and there are no alternatives for these regulations.

List of Subjects in 13 CFR Part 127

Administrative practice and procedure, Government procurement,
Reporting and recordkeeping requirements, Small businesses.

Accordingly, for the reasons stated in the preamble, SBA proposes to amend 13 CFR part 127 as follows:

PART 127--WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT
PROGRAM

1. The authority for 13 CFR part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), and 644.

2. Revise § 127.101 to read as follows:

§ 127.101 What type of assistance is available under this part?

This part authorizes contracting officers to restrict competition or award sole source contracts or orders to eligible Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) for certain Federal contracts or orders in industries in which the Small Business Administration (SBA) determines that WOSBs are underrepresented in Federal procurement. It also authorizes contracting officers to restrict competition or award sole source contracts or orders to eligible WOSBs for certain Federal contracts or orders in industries in which SBA determines that WOSBs are substantially underrepresented in Federal procurement and has waived the economically disadvantaged requirement.

3. Amend § 127.102 by revising the definitions of the terms “EDWOSB requirement”, “Substantial underrepresentation”, “Underrepresentation”, and “WOSB requirement” to read as follows:

§127.102 What are the definitions of the terms used in this part?

* * * * *

EDWOSB requirement means a Federal requirement for services or supplies for which a contracting officer has restricted competition or awarded a sole source contract or order to eligible EDWOSBs, including Multiple Award Contracts, partial set-asides, reserves, sole source awards, and orders set-aside for EDWOSBs issued against a Multiple Award Contract.

* * * * *

Substantial underrepresentation is determined by a study using a reliable and relevant methodology.

* * * * *

Underrepresentation is determined by a study using a reliable and relevant methodology.

* * * * *

WOSB requirement means a Federal requirement for services or supplies for which a contracting officer has restricted competition or awarded a sole source contract or order to eligible WOSBs, including Multiple Award Contracts, partial set-asides, reserves, sole source awards, and orders set-aside for WOSBs issued against a Multiple Award Contract.

4. Revise § 127.500 to read as follows:

§ 127.500 In what industries is a contracting officer authorized to restrict competition or make a sole source award under this part?

A contracting officer may restrict competition or make a sole source award under this part only in those industries in which SBA has determined that WOSBs are underrepresented or substantially underrepresented in Federal procurement, as specified in § 127.501.

5. Amend § 127.503 as follows:

- a. Revise section heading;
- b. Revise paragraph (a) subject heading and paragraph (b) subject heading;
- c. Redesignate paragraphs (c), (d), (e) and (f) as paragraphs (e), (f), (g) and (h); and
- d. Add new paragraphs (c) and (d).

The revisions and additions read as follows:

§ 127.503 When is a contracting officer authorized to restrict competition or award a sole source contract or order under this part?

(a) Competition restricted to EDWOSBs. * * *

(b) Competition restricted to WOSBs. * * *

(c) Sole source awards to EDWOSBs. For requirements in industries designated by SBA as underrepresented pursuant to § 127.501, a contracting officer may issue a sole source award to an EDWOSB when the contacting officer determines that:

(1) The EDWOSB is a responsible contractor with respect to performance of the requirement and the contracting officer does not have a reasonable expectation that 2 or more EDWOSBs will submit offers;

(2) The anticipated award price of the contract (including options) will not exceed \$6,500,000 in the case of a contract assigned a North American Industry Classification System (NAICS) code for manufacturing, or \$4,000,000 in the case of any other contract opportunity; and

(3) In the estimation of the contracting officer, the award can be made at a fair and reasonable price.

(d) Sole source awards to WOSBs. For requirements in industries designated by SBA as substantially underrepresented pursuant to § 127.501, a contracting officer may issue a sole source award to a WOSB when the contracting officer determines that:

(1) The WOSB is a responsible contractor with respect to performance of the requirement and the contracting officer does not have a reasonable expectation that 2 or more WOSBs will submit offers;

(2) The anticipated award price of the contract (including options) will not exceed \$6,500,000 in the case of a contract assigned a NAICS code for manufacturing, or \$4,000,000 in the case of any other contract opportunity; and

(3) In the estimation of the contracting officer, the award can be made at a fair and reasonable price.

* * * * *

6. Revise § 127.507 to read as follows:

§ 127.507 Are there EDWOSB and WOSB contracting opportunities at or below the simplified acquisition threshold?

If the requirement is valued at or below the simplified acquisition threshold, the contracting may set aside the requirement or award the requirement on a sole source basis as set forth in § 127.503.

7. Revise §127.600 to read as follows:

§127.600 Who may protest the status of a concern as an EDWOSB or WOSB?

(a) For sole source procurements. SBA or the contracting officer may protest the proposed awardee's EDWOSB or WOSB status.

(b) For all other EDWOSB or WOSB requirements. An interested party may protest the apparent successful offeror's EDWOSB or WOSB status.

Dated: April 27, 2015

Maria Contreras-Sweet,
Administrator

[FR Doc. 2015-10331 Filed: 4/30/2015 08:45 am; Publication Date: 5/1/2015]